

**VIRGINIA SPECIAL EDUCATION PROCEDURAL SAFEGUARD REQUIREMENTS
UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT
Revised June 2005**

This document amends the February 2001 Procedural Safeguards Document of the Virginia Department of Education. The revisions reflect the new mandates of the *Individuals with Disabilities Education Improvement Act* of 2004 (IDEA '04; P.L. 108-446; 20 USC §1400 et seq). These mandates are effective July 1, 2005. Any federal or state regulation not impacted by a mandate of the IDEA '04 remains in effect until the provision is changed by revised federal and state regulations implementing the IDEA '04. This document will be amended following issuance of revised federal regulations and revised state regulations implementing the IDEA '04.

The parent or parents of a child who is suspected to be or identified as a child, age two to 21 inclusive, needing special education has certain rights guaranteed by state and federal laws. The same rights apply to a child who has reached the age of majority (age 18 in Virginia), and is suspected as needing or identified as needing special education.

"Parent or parents" means a natural or adoptive parent or parents of a child, a guardian, a person acting in the place of a parent (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare), a foster parent under the circumstances described below, or a surrogate parent who has been appointed in accordance with Virginia regulations. The term means either parent, unless the LEA has been provided with evidence that there is a legally binding instrument, state law, or court order that has terminated the parent's or parents' rights. A foster parent may also serve as a parent: if the natural parent's or parents' authority to make educational decisions on the child's behalf has been extinguished under specific sections of the Code of Virginia or a comparable law in another state; the child is in permanent foster care pursuant to the Code of Virginia or comparable law in another state; and the foster parent or parents have an ongoing, long-term parental relationship with the child, are willing to make the educational decisions required of the parent or parents under this chapter, and have no interest that would conflict with the interests of the child. The term "parent or parents" does not include local or state agencies or their agents, including local departments of social services, if the child is in the custody of such an agency. The terms parent or parents as used in this document refer to one or both parents.

Special education means specially designed instruction, at no cost to the parent or parents, to meet the unique needs of a child with a disability, including instruction conducted in a classroom, in the home, in hospitals, in institutions, and in other settings and instruction in physical education. The term includes speech-language pathology services, vocational education, and travel training. Parents, students, and local educational agencies share in the education of the students. The term **LEA (local educational agency)**, by definition in Virginia regulations, includes local school divisions, state-operated programs, and the Virginia Schools for the Deaf and the Blind.

Virginia regulations refer to the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* (8 VAC 20-80-10 through 8 VAC 20-80-190), 2001/2002.

I. Transfer of parental rights at age of majority

All rights accorded to the parent or parents under IDEA transfer to children upon the age of majority (age 18), including those students who are incarcerated in an adult or juvenile federal, state, regional, or local correctional institution.

Notification

- The LEA shall notify the parent and the student that educational rights under IDEA will transfer from the parent or parents to the student upon the student reaching the age of majority. Such notification must be given at least one year prior to the student's eighteenth birthday.
- The LEA shall notify the parent and the student that procedures exist for appointing the parent or parents or, if the parent or parents are not available, another appropriate individual to represent the educational interests of

the student throughout the student's eligibility for special education and related services if the student is determined not to have the ability to provide informed consent with respect to the educational program.

- The LEA shall include a statement on the Individualized Education Program (IEP) (beginning at least one year before the student reaches the age of majority) that the student has been informed of the rights that will transfer to the student on reaching the age of 18.
- The LEA shall provide any further notices required under the IDEA to both the student and the parent or parents.
- The LEA may continue to invite the parent or parents, as appropriate, as bona fide interested parties knowledgeable of the student's abilities, to participate in meetings where decisions are being made regarding their adult student's educational program.
- The adult student may invite the student's parent or parents to participate in meetings where decisions are being made regarding the student's educational program.

A student who has reached the age of 18 years shall be presumed to be a competent adult, and thus all rights under the IDEA shall transfer to the adult student, unless one of the actions outlined in the Virginia regulations at 8 VAC 20-80-72 C has been taken.

II. Procedural safeguards notice

A copy of the procedural safeguards available to the parent or parents of a child with a disability must be given to the parent or parents only one time a year, and upon:

- initial referral or parental request for evaluation;
- filing a request for a due process hearing; and,
- request by a parent.

The LEA may place a current copy of the procedural safeguards notice on its internet website if such website exists.

Contents. The procedural safeguards notice must include a full explanation of all of the procedural safeguards available relating to:

- independent educational evaluation;
- prior written notice;
- parental consent;
- access to educational records;
- opportunity to present and resolve disputes in due process hearings, including:
 - (1) the time period in which to make the request for due process;
 - (2) the opportunity for the LEA to resolve the issues; and
 - (3) the availability of mediation;
- the child's placement during pendency of due process proceedings;
- procedures for students who are subject to placement in an interim alternative educational setting;
- requirements for unilateral placement by parents of children in private schools at public expense;
- due process hearings, including requirements for disclosure of evaluation results and recommendations;
- civil actions, including the time period in which to file such actions;
- attorneys' fees; and
- the State complaint procedures including a description of how to file a complaint and the timelines under those procedures.

Notice in understandable language.

- The notice required above must be written in language understandable to the general public; and provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.
- If the native language or other mode of communication of the parent is not a written language, the LEA shall take steps to ensure that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication; that the parent understands the content of the notice; and that there is written evidence that the requirements have been met.

General responsibility of public agencies; definitions.

Responsibility of the State Educational Agency (SEA) and other local educational agencies¹. Each SEA shall ensure that each LEA establishes, maintains, and implements procedural safeguards that meet the requirements of the federal regulations implementing IDEA relative to procedural safeguards.

As used in these Procedural Safeguards:

- Consent means that the parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication; the parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and the parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime. If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked). If the parent or parents revoke consent for the child to continue to receive special education and related services, the LEA must follow the procedures for eligibility in the Virginia regulations at 8 VAC 20-80-56 to terminate the child's eligibility or use other measures as necessary to ensure that parental revocation of consent will not result in the withdrawal of a necessary FAPE for the child;
- Evaluation means procedures used in accordance with the IDEA '04 §1414 (a) through (c) and the current federal regulations, 34 CFR §§ 300.530-300.536, "Procedures for Evaluation and Determination of Eligibility", not impacted by the IDEA '04, to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs; and
- Personally identifiable means information that includes the name of the child, the child's parent, or other family member; the address of the child; a personal identifier, such as the child's social security number or student number; or a list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

III. Opportunity to examine records; parent participation in meetings

The parents of a child with a disability must be afforded an opportunity to:

- inspect and review all education records with respect to the identification, evaluation, and educational placement of the child; and the provision of a free appropriate public education (FAPE) to the child; and
- participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child.

Parent participation in meetings.

- Each LEA shall provide notice indicating the purpose, date, time, location, and who will attend early enough to ensure that parents of children with disabilities have the opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. Meetings shall be scheduled at a mutually agreed on time and place.
- The notice must also inform the parent or parents that at their discretion or at the discretion of the LEA, other individuals who have knowledge or special expertise regarding the child, including related services personnel, as appropriate, may participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of a FAPE to the child; and inform the parent that the determination of the knowledge or special expertise shall be made by the party who invited the individual.
- A meeting does not include informal or unscheduled conversations involving LEA personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision if those issues are not addressed in the child's (IEP). A meeting also does not include preparatory activities that LEA personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.
- The IEP may be amended after the annual IEP meeting without the necessity of calling a new IEP meeting, if the parents and the LEA agree to such action. The amendment or modification to the IEP must be in writing.

¹The State Educational Agency is the Virginia Department of Education.

The IEP can be amended, rather than be completely redrafted, unless the parent requests a revised copy with the amendments incorporated.

- Parents and LEA may jointly excuse an IEP team member from attending the IEP team meeting:
 - (1) because the area of the curriculum or related services is not being modified or discussed. The agreement to excuse an IEP team member must be in writing and include parent consent.
 - (2) A member may be excused even if their curriculum or service area is being discussed by the written agreement of the parent and the school division. The IEP team member shall submit their input to the team in writing.
- At the request of the parent, the LEA must invite the Part C coordinator or other representative of the Part C program to the IEP meeting for a child transitioning from Part C to Part B services.

Additional Virginia requirements for parent participation in meetings:

- A written copy of the evaluation report shall be provided to the parent or parents. The report shall be available to the parent or parents no later than two business days before the meeting to determine eligibility.
- The LEA shall permit the use of audio recording devices at IEP meetings. The parent or parents shall inform the LEA before the meeting in writing, unless the parents cannot write in English, that they will be audio recording the meeting. If the parent or parents do not inform the LEA, the parent or parents shall provide the LEA with a copy of the audio recording. The parent or parents shall provide their own audio equipment and materials for audio recording. If the LEA audio records the meetings or receives a copy of an audio recording from the parent or parents, the audio recording becomes part of the child's educational record.
- At the IEP meeting, the IEP team shall provide the parent or parents of a child with a disability with a written description of the factors that will be considered during the IEP meeting. The description shall be written in language understandable by the general public and provided in the native language of the parent or parents or other mode of communication used by the parent or parents, unless it is clearly not feasible to do so.

Parent involvement in placement decisions.

- Each LEA shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child including any Comprehensive Services Act team that makes decisions on the educational placement of their child.
- In implementing the requirements of the previous bullet the LEA shall use procedures consistent with the procedures to indicate the purpose, time, location, and who will attend early enough to ensure participation. Meetings shall be scheduled at a mutually agreed on time and place.
- If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the LEA shall use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.
- A placement decision may be made by a group without the involvement of the parents, if the LEA is unable to obtain the parents' participation in the decision. In this case, the LEA must have a record of its attempts to ensure their involvement, including information that is consistent with the federal regulations implementing the IDEA.
- The LEA shall make reasonable efforts to ensure that the parents understand, and are able to participate in, any group discussions relating to the educational placement of their child, including arranging for an interpreter for parents with deafness, or whose native language is other than English.

IV. Independent educational evaluation

- The parents of a child with a disability have the right to obtain an independent educational evaluation of the child, subject to the subsequent requirements of this section.
- Each LEA shall provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations.
- For the purposes of this part Independent educational evaluation (IEE) means an evaluation conducted by a qualified examiner who is not employed by the LEA responsible for the education of the child in question; and Public expense means that the LEA either pays for the full cost of the evaluation or ensures that the evaluation

is otherwise provided at no cost to the parent, consistent with federal regulations implementing the IDEA relative to methods and payments.

Parent right to evaluation at public expense.

- A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the LEA.
- If a parent requests an independent educational evaluation at public expense, the LEA must, without unnecessary delay, either initiate a due process hearing to show that its evaluation is appropriate; or ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing that the evaluation obtained by the parent did not meet agency criteria.
- If the LEA initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.
- If a parent requests an independent educational evaluation, the LEA may ask for the parent's reason why he or she objects to the public evaluation. However, the explanation by the parent may not be required and the LEA may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

Parent-initiated evaluations. If the parent obtains an independent educational evaluation at private expense, the results of the evaluation must be considered by the LEA, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and may be presented as evidence at a hearing regarding that child.

Requests for evaluations by hearing officers. If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

Agency criteria.

- If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the LEA uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.
- Except for the criteria described in the previous bullet, a LEA may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

V. Prior notice by the public agency; content of notice

Notice.

- Written notice that meets the requirements below must be given to the parents of a child with a disability within a reasonable time before the LEA proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child, including graduation with a standard or advanced studies diploma.
- If the notice relates to an action proposed by the LEA that also requires parental consent under, the LEA may give notice at the same time it requests parent consent.

Content of notice. The notice required above must include:

- a description of the action proposed or refused by the LEA;
- an explanation of why the LEA proposes or refuses to take the action;
- a description of any other options that the LEA considered and the reasons why those options were rejected;
- a description of each evaluation procedure, test, record, or report the LEA used as a basis for the proposed or refused action;
- a description of any other factors that are relevant to the LEA's proposal or refusal;
- a statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and
- sources for parents to contact to obtain assistance in understanding the provisions of this part.

Notice in understandable language.

- The notice required above must be written in language understandable to the general public; and provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.
- If the native language or other mode of communication of the parent is not a written language, the LEA shall take steps to ensure that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication; that the parent understands the content of the notice; and that there is written evidence that the requirements have been met.
- A teacher or specialist may screen a student for the purposes of determining appropriate instructional strategies for curriculum implementation. This screening shall not be considered an evaluation for eligibility for special education and related services and does not require parental consent.

VI. Parental consent

- Informed parent consent must be obtained before conducting an initial evaluation or reevaluation, including a functional behavioral assessment if such assessment is not a review of existing data conducted at an IEP meeting, and initial provision of special education and related services to a child with a disability.
- Consent for initial evaluation may not be construed as consent for initial placement.
- Consent is required before the LEA provides special education and related services to the child.
- Parental consent is not required before reviewing existing data as part of an evaluation or a reevaluation; or administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children. Parental consent is not required before a teacher's or related services provider's observations or ongoing classroom evaluations or for the administration of a test or other evaluation that is used to measure progress on the child's goals and benchmarks or objectives and is included in the IEP.

Consent for wards of the state.

- If the child is a ward of the State and is not residing with the child's parent, the LEA shall make reasonable efforts to obtain the informed consent from the parent of the child for an initial evaluation to determine whether the child is a child with a disability. Such consent is not required if:
 - (1) despite reasonable efforts to do so, the LEA cannot discover the whereabouts of the parent of the child;
 - (2) the rights of the parents of the child have been terminated in accordance with State law; or
 - (3) the rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.

Additional Virginia consent requirements.

- The LEA shall obtain parental consent for the initial eligibility determination. Thereafter, parental consent shall be secured for any change in identification of a child with a disability, and for any revision to the child's IEP.
- No changes shall be made to a child's eligibility for special education and related services without parental consent.
- Informed parent consent must be obtained before any partial or complete termination of special education and related services, except graduation with a standard or advanced studies diploma.
- If a child with a disability has been receiving special education from one LEA in Virginia and transfers to another, the new LEA is responsible for ensuring that the child has comparable special education and related services in consultation with the parents, until the new LEA either adopts the previous IEP or develops a new one.
- When a child with a disability under IDEA transfers to a LEA in Virginia from another state, the Virginia LEA must decide whether it will adopt the most recent evaluation and IEP developed for the child by the LEA in the previous state. The Virginia LEA must determine, as an initial matter, whether it believes that the child has a disability and whether the most recent evaluation of the child conducted by the LEA in the previous state and the IEP developed by that LEA meet the requirements of IDEA. The new LEA shall provide comparable services in consultation with the parents, until the new LEA conducts a new evaluation, if necessary, and develops a new IEP.

- Informed parent consent must be obtained each time the LEA proposes to access the parent's or parents' public private insurance proceeds.

Refusal.

- If the parents of a child with a disability refuse consent for initial evaluation or the parent fails to respond to a request to provide consent, the LEA may continue to pursue those evaluations by using the procedures for due process or mediation.
- The LEA shall seek to obtain informed consent from the parent of a child before providing initial special education and related services to the child.
- If the parent refuses to consent to the initial services, the LEA shall not pursue obtaining such consent by utilizing the due process procedures.
- If the parent of a child with a disability refuses to consent to the receipt of special education and related services, or the parent fails to respond to a request to provide such consent:
 - (1) the LEA shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the LEA requests for such consent; and
 - (2) the LEA shall not be required to convene an IEP meeting or develop an IEP for the child for the special education and related services for which the LEA requests such consent.
- The LEA may initiate a due process hearing to resolve consent disagreements regarding continuing IEPs.

Failure to respond to request for reevaluation.

- Informed parental consent need not be obtained for reevaluation if the LEA can demonstrate that it has taken reasonable measures to obtain that consent, and the child's parent has failed to respond, the LEA shall proceed as if consent has been given by the parent or parents.
- To meet the reasonable measures requirement, the LEA must have a record of its attempts to arrange a mutually agreed on time and place, such as detailed records of telephone calls made or attempted and the results of those calls; copies of correspondence sent to the parents and any responses received; and detailed records of visits made to the parent's home or place of employment and the results of those visits.

Limitation. The LEA may not use a parent's refusal to consent to one service or activity under this consent section to deny the parent or child any other service, benefit, or activity of the LEA, except as required by this part.

VII. Mediation

Each LEA shall ensure that the parent or parents of a child with a disability are informed of the option of mediation to resolve any matter, including matters arising prior to the filing of a request for due process, related to the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

- The LEA shall use the Virginia Department of Education's mediation process to resolve such disputes.
- The procedures must ensure that the mediation process is voluntary on the part of the parties; is not used to deny or delay a parent's right to a due process hearing, or to deny any other rights afforded under the IDEA; and is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.
- The Virginia Department of Education shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services. The mediator shall be chosen on a rotation basis.
- The Virginia Department of Education shall bear the cost of the mediation process, including the costs of meetings to encourage mediation.
- Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.
- Each mediation process shall conclude with a written mediation agreement if an agreement is reached by the parties to the dispute. The agreement is a legally binding agreement that sets forth the resolution and:
 - (1) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;
 - (2) is signed by both the parent and a representative of the LEA who has the authority to bind the LEA; and
 - (3) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

An individual who serves as a mediator:

- May not be an employee of any LEA or the Virginia Department of Education if it is providing direct services to a child who is the subject of the mediation process;
- Must not have a personal or professional conflict of interest; and
- Is not an employee of the LEA or the Virginia Department of Education solely because the person is paid by the agency to serve as a mediator.

Meeting to encourage mediation.

- The LEA may establish procedures to offer parents and schools that choose not to use the mediation process an opportunity to meet, at a time and location convenient to the parent or parents, with a disinterested party who is under contract with a parent training and information center or community parent resource center in Virginia established under the IDEA; or an appropriate alternative dispute resolution entity. The purpose of the meeting is to explain the benefits of and encourage the use of the process.
- The LEA may not deny or delay a parent's or parents' right to a due process hearing if the parent or parents choose not to participate in this meeting.

VIII. Impartial due process hearing

The Virginia Department of Education administers a special education due process hearing system that provides procedures for the training of hearing officers, requests for a hearing, appointment of hearing officers, the management and monitoring of hearings, and the administration of the hearing system. The Virginia Department of Education is responsible for the operation of the due process system; however, the LEA shares responsibility for the hearing process by ensuring the timely appointment of officers, communicating with the Virginia Department of Education, assisting with the hearing, and implementing the hearing officer's decision. A hearing officer's decision may be appealed directly to any state court of competent jurisdiction or to a district court of the United States.

- Either a parent or parents or a LEA may request a hearing when a disagreement arises regarding the identification of a child with a disability, evaluation of a child with a disability (including disagreements regarding payment for an independent educational evaluation), educational placement and services of the child, and the provision of a FAPE to the child.
- The request for a hearing shall be made within 2 years of the date the parent or LEA knew or should have known about the alleged action that forms the basis of the request. Exceptions to the timeline apply if the parent was prevented from requesting the hearing due to:
 - (1) specific misrepresentations by the LEA that it had resolved the problem forming the basis of the complaint; or
 - (2) the LEA's withholding of information from the parent that was required under the requirements to be provided to the parent.
- The LEA shall upon receipt of a request for a due process hearing, inform the parent or parents of the availability of mediation and of any free or low-cost legal and other relevant services available in the area. The LEA must also provide the parent or parents with a procedural safeguards notice.
- The LEA shall appoint the hearing officer within five business days of the request for a hearing. The LEA contacts the Supreme Court of Virginia to secure the name of a hearing officer, contacts the hearing officer to confirm availability, and upon acceptance, appoints the hearing officer in writing, with a copy to the Virginia Department of Education. In the case of an expedited hearing, the LEA must appoint the hearing officer within three business days of the request for a hearing.
- In circumstances involving disciplinary actions, the parent or parents of a student with a disability may request an expedited due process hearing if the parent or parents disagree with a determination that the child's behavior was not a manifestation of the child's disability, or any decision regarding placement under the disciplinary procedures.
- The LEA may request an expedited hearing if the LEA maintains that it is dangerous for the child to be in the current placement (placement prior to removal to the interim alternative setting) during the pendency of the due process proceedings.

Procedure for requesting a due process hearing.

- A request for a hearing shall be made in writing to the LEA, with a copy to the Virginia Department of Education. If the request is received solely by the Virginia Department of Education, the Virginia Department of Education shall immediately notify the LEA by telephone or by facsimile and forward a copy of the request to the LEA within one day of the Virginia Department of Education's receipt, including those cases where mediation is requested. The request for a hearing shall be kept confidential by the LEA and the Virginia Department of Education.

Parent notice to the LEA.

- The LEA must have procedures that require the parent of a child with a disability or the attorney representing the child to provide notice (which must remain confidential) to the LEA in a request for a due process hearing.
- Content of parent notice. The notice must include the name of the child, the address of the residence of the child, the name of the school the child is attending, a description of the child's problem relating to the proposed or refused initiation or change including facts relating to the problem, and a proposed resolution of the problem to the extent known and available to the parent at the time of the notice. In the case of a homeless child or youth (within the meaning of §752(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 1143a(2)), available contact information is needed for the child and the name of the school the child is attending.
- A party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the content requirements.
- Model form to assist parents. The Virginia Department of Education shall develop a model form to assist parents in filing a request for due process that includes the information required in this section.
- Right to due process hearing. A LEA may not deny or delay a parent's right to a due process hearing for failure to provide the notice required in this section.
- The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice, unless the other party agrees otherwise.

Challenging the request for a due process hearing.

- The due process notice shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing within 15 days of receiving the notice that the receiving party believes the notice has not met the content requirements.
- Within 5 days of receipt of the notification that the notice is deficient, the hearing officer shall make a determination on the face of the notice of whether the notification meets the content requirements. The hearing officer shall notify the parties in writing of such determination.
- A party may amend its due process notice only if:
 - (1) the other party consents in writing to such amendment and is given the opportunity to resolve the issues through a resolution meeting noted below; or
 - (2) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.
- The timeline for a due process hearing shall recommence at the time the party files an amended notice, including the timeline for the resolution session process.

Response to the notice for a due process hearing.

Written Prior Notice

- If the LEA has not sent a prior written notice to the parent regarding the issues raised by the parent, the LEA shall, within 10 days of receiving the notice, send to the parent a response that shall include:
 - (1) an explanation of why the LEA proposed or refused to take the action raised in the notice;
 - (2) a description of other options that the IEP team considered and the reasons why those options were rejected;
 - (3) a description of each evaluation procedures, assessment, record, or report the LEA used as the basis for the proposed or refused action; and
 - (4) a description of the factors that are relevant to the LEA's proposal or refusal.
- This notification shall not be construed to preclude the LEA from asserting that the parent's due process notice was insufficient where appropriate.

Response to the Notice

- The non-complaining party shall, within 10 days of receiving the notice for a due process hearing shall send to the complaining party a response that specifically addresses the issues raised in the notice.

Resolution Session.

- Within 15 days of receiving notice of the parents' complaint, the LEA shall convene a meeting with the parents and the relevant member or members of the IEP team who have specific knowledge of the facts identified in the notice requesting due process.
- The parents and the LEA may agree in writing to waive the resolution session, or agree to use the mediation process.
- The team shall include a representative of the LEA who has decision-making authority on behalf of the LEA.
- The team shall not include an attorney of the LEA unless the parent is accompanied by an attorney.
- During the resolution session, the parents of the child discuss their issues in the notice, and the LEA is provided the opportunity to resolve the issues.
- If the LEA has not resolved the issues to the satisfaction of the parents within 30 days of the receipt of the notice, the due process hearing may occur, and all of the applicable timelines for a due process hearing shall commence.
- If resolution is reached, the parties shall execute a legally binding agreement that is:
 - (1) signed by both the parent and a representative of the LEA who has the authority to bind the LEA; and
 - (2) enforceable in any State court of competent jurisdiction or in a district court of the United States.
- If the parties execute an agreement, a party may void such agreement within 3 business days of the agreement's execution.

Impartial hearing officer.

A hearing officer is appointed to a case from a list maintained by the Supreme Court of Virginia.

Upon request, the Virginia Department of Education shall share information on qualifications of the hearing officer with the parent or parents and the LEA, and either party has two business days to object to the appointment on the basis of conflict of interest.

A hearing shall not be conducted by a person who:

- has a personal or professional interest which would conflict with that person's objectivity in the hearing;
- is an employee of the Virginia Department of Education or the LEA that is involved in the education and care of the child. A person who otherwise qualifies to conduct a hearing is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.
- represents schools or parents in any matter involving special education or disability rights, or is an employee of any parent rights agency or organization, or disability rights agency or organization.

If a hearing officer recuses himself or herself or is otherwise disqualified, the LEA shall ensure that another hearing officer is promptly appointed.

A hearing officer shall:

- possess knowledge of, and the ability to understand, the provisions of the law and regulations governing special education, and legal interpretations by federal and state courts;
- possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
- possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

Hearing rights.

Any party to a hearing has the right to:

- be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
- present evidence and confront, cross-examine, and request that the hearing officer compel the attendance of witnesses;
- move that the hearing officer prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing, or in the case of an expedited hearing, two business days before the hearing;
- obtain at no cost a written, or, at the option of the parents, electronic, verbatim record of the hearing; and
- obtain at no cost a written, or, at the option of the parents, electronic findings of fact and decisions.

Additional disclosure of information.

- At least five business days prior to a non-expedited hearing and two business days prior to an expedited hearing, each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.
- A hearing officer may bar any party that fails to comply with the required timeline from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

Parents involved in hearings must be given the right to have the child who is the subject of the hearing be present and to open the hearing to the public.

Decision of the hearing officer.

- A decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.
- In matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies:
 - (1) impeded the child's right to a free appropriate public education;
 - (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or
 - (3) caused a deprivation of educational benefits.

Nothing in these requirements shall be construed to preclude a hearing officer from ordering the LEA to comply with procedural requirements under the law and regulations governing special education.

- Nothing in these requirements shall be construed to affect the right of a parent to file a complaint with the Virginia Department of Education.
- A decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless the decision is appealed by a party in state circuit court within one year of the issuance of the decision or in a federal district court within 90 days from the date of the hearing officer's decision. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy. The district courts of the United States have jurisdiction over actions brought under § 1415 of the IDEA without regard to the amount in controversy.
- On appeal, the court shall receive the record of the administrative proceedings, shall hear additional evidence at the request of a party, shall base its decision on a preponderance of evidence, and shall grant the relief that the court determines to be appropriate.
- If the hearing officer's decision is appealed in court, implementation of the hearing officer's order is held in abeyance except in those cases where the hearing officer has agreed with the child's parent or parents that a change in placement is appropriate in accordance with Virginia Regulations. In those cases, the hearing officer's order must be implemented while the case is being appealed.

Findings and decisions to advisory panel and general public.

The Virginia Department of Education, after deleting any personally identifiable information, shall transmit the findings and decisions to the state advisory panel (State Special Education Advisory Committee in Virginia), and make those findings and decisions available to the public.

Timelines.

- The hearing officer shall ensure that not later than 45 calendar days after the receipt of a request for a hearing a final decision is reached in the hearing; and a copy of the decision is mailed to each of the parties. The timeline for an expedited hearing is 30 school days. The hearing must be scheduled within 20 school days of receipt of the request for due process. The hearing officer's decision must be sent to the parties within 10 school days after the hearing.
- With the exception of an expedited hearing, a hearing officer may grant specific extensions of time beyond the 45 calendar day period at the request of either party only when it serves the best interest of the child. For expedited hearings, the timeline may not be extended without exception.
- Each hearing involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

Civil action.

Any party aggrieved by the findings and decision in a due process hearing has the right to bring a civil action. The action may be brought in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

The court shall:

- receive the records of the administrative proceedings;
- hear additional evidence at the request of a party; and
- basing its decision on the preponderance of the evidence, grant the relief that the court determines to be appropriate.

Jurisdiction of district courts. The district courts of the United States have jurisdiction of actions brought under §1415 IDEA without regard to the amount in controversy.

Nothing in the IDEA or its implementing regulations restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973, as amended, or other federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under §1415 of the IDEA, the procedures for due process must be exhausted to the same extent as would be required had the action been brought under §1415 of the IDEA.

Attorneys' fees.

In any action or proceeding brought under §1415 of the IDEA, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to:

- the parents of a child with a disability who is the prevailing party;
- the state educational agency or LEA who is the prevailing party, against the attorney of a parent who files a notice for a due process hearing or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or
- the state educational agency or LEA against the attorney of a parent, or against the parent, if the parent's notice for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

Funds under Part B of the IDEA may not be used to pay attorneys' fees or costs of a party related to an action or proceeding under §1415 of the IDEA and implementing federal regulations, subpart E. That section does not preclude the LEA from using funds under Part B of the IDEA for conducting an action or proceeding under §1415 of the IDEA.

A court awards reasonable attorney's fees consistent with the following:

- Determination of amount of attorneys' fees. Fees awarded must be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.
- Prohibition of attorneys' fees and related costs for certain services.

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under §1415 of the IDEA for services performed subsequent to the time of a written offer of settlement to a parent if:

- The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;
- The offer is not accepted within 10 days; and
- The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

Attorneys' fees may not be awarded relating to any meeting of the IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action for a mediation that is conducted prior to the filing of a request for due process.

- A meeting conducted as the Resolution Session shall not be considered a meeting convened as a result of an administrative hearing or judicial action; or an administrative hearing or judicial action for purposes of this requirement.

Exception to prohibition on attorneys' fees and related costs.

Notwithstanding the prohibition of attorney's fees and related costs for certain services, an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

Reduction of amount of attorneys' fees.

The court reduces, accordingly, the amount of the attorneys' fees awarded under §1415 of the IDEA, if the court finds that the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy; the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience; the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or the attorney representing the parent did not provide to the school division the appropriate information in the due process notice.

Exception to reduction in amount of attorneys' fees. The provisions above do not apply in any action or proceeding if the court finds that the State or local agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of §1415 of the IDEA.

Child's status during proceedings.

During the pendency of any administrative or judicial proceeding unless the State or local agency and the parents of the child agree otherwise, the child involved in the proceeding must remain in his or her current educational placement. The exceptions are:

- In matters involving disciplinary actions, and a due process hearing is requested, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in the interim alternative educational setting, whichever occurs first, unless the parent and the state or LEA agree otherwise.
- If the proceeding involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.
- If the decision of a hearing officer agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the LEA and the parents for purposes of maintaining the child's placement during the pendency of any administrative or judicial proceeding.
- If the parent or parents request a due process hearing to challenge the child's removal from a placement that was made for noneducational reasons by a Comprehensive Services Act team, the child shall remain in the

previous IEP placement agreed upon by the parent or parents and the LEA prior to placement by the Comprehensive Services Act team.

IX. Surrogate parents

Each LEA shall ensure that the rights of a child are protected if:

- No parent as defined in this document can be identified; or
- The LEA, after reasonable efforts, cannot discover the whereabouts of a parent.
- The child is a ward of the state, such surrogate may alternatively be appointed by the judge overseeing the child's care provided that the surrogate meets the requirements of a surrogate.
- The child is an unaccompanied homeless youth as defined in §725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 1143a(6)), the LEA shall appoint a surrogate.

A surrogate parent shall be appointed as the educational representative for a child who reaches the age of majority if the LEA has received written notification that the child is not competent to provide informed consent and no family member is available to serve as the child's educational representative.

Children, aged two to 21, inclusive, who are suspected of having or determined to have disabilities do not require a surrogate parent if:

- The natural parent or parents or guardians are allowing relatives or private individuals to act as a parent;
- The child is in the custody of the local department of social services or a licensed child-placing agency, and termination of parental rights has been granted by a juvenile and domestic relations district court of competent jurisdiction in accordance with § 16.1-283, § 16.1-277.01, or § 16.1-277.02 of the Code of Virginia. The foster parent for that child may serve as the parent of the child for the purposes of any special education proceedings; or
- The child is in the custody of a local department of social services or a licensed child-placing agency, and a permanent foster care placement order has been entered by a juvenile and domestic relations district court of competent jurisdiction in accordance with § 63.1-206.1 of the Code of Virginia. The permanent foster parent named in the order for that child may serve as the parent of the child for the purposes of any special education proceedings.

Duty of LEA. The duty of the LEA under this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method:

- for determining whether a child needs a surrogate parent; and
- for assigning a surrogate parent to the child not more than 30 days after there is a determination by the LEA that the child needs a surrogate.

Criteria for selection of surrogates. The LEA may select a surrogate parent in any way permitted under state law. Local educational agencies shall ensure that a person selected as a surrogate:

- is not an employee of the Virginia Department of Education, the LEA, or any other agency that is involved in the education or care of the child;
- has no interest that conflicts with the interest of the child he or she represents; and
- has knowledge and skills that ensure adequate representation of the child.

The LEA may select as a surrogate a person who is an employee of a nonpublic agency that only provides non-educational care for the child and who meets the previous criteria.

Non-employee requirement; compensation. A person who otherwise qualifies to be a surrogate parent is not an employee of the LEA solely because he or she is paid by the LEA to serve as a surrogate parent.

Responsibilities. The surrogate parent may represent the child in all matters relating to:

- the identification, evaluation, and educational placement of the child; and
- the provision of FAPE to the child.

X. Discipline procedures

A student with a disability shall be entitled to the same due process rights that all students are entitled to under the Code of Virginia and the LEA's disciplinary policies and procedures.

For purposes of removals of a child with a disability from the child's current educational placement, a change of placement occurs if:

- The removal is for more than 10 consecutive school days; or
- The child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another.

Authority of school personnel.

School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct. School personnel may order:

- To the extent removal would be applied to children without disabilities, the removal of a child with a disability from the child's current placement for not more than 10 consecutive school days for any violation of school rules, and additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct as long as those removals do not constitute a change of placement. After a child with a disability has been removed from his or her current placement for more than 10 school days in the same school year, during any subsequent days of removal the LEA must provide services to the extent required for children suspended or expelled from school; and
- A change in placement of a child with a disability to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 school days, if:
 - (1) the child possesses or carries a weapon to school or to a school function under the jurisdiction of the Virginia Department of Education or a LEA; or
 - (2) the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or LEA; or
 - (3) the child has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the Virginia Department of Education or LEA.

The LEA shall ensure that the following procedures are implemented either before or not later than 10 business days after either first removing the student for more than 10 school days in a school year or commencing a removal that constitutes a change in placement including placements in interim alternative educational settings.

- The IEP team shall convene to develop a behavioral assessment plan if the LEA did not conduct a functional behavioral assessment and implement a behavioral plan for the student before the behavior resulted in the removal.
- The functional behavioral assessment may be a review of existing data that can be completed at the IEP meeting. Parental consent is not necessary to review existing data.
- The IEP team shall reconvene as soon as practicable after developing the assessment plan and completing the assessments required by the plan. The IEP team shall develop and implement appropriate behavioral interventions to address the behavior.
- If the student had a behavioral intervention plan before engaging in the behavior, the IEP team shall convene to review the plan and its implementation and modify the plan and its implementation, as necessary, to address the behavior.

As soon as practicable after developing the behavioral intervention plan, and completing the assessments required by the plan, the LEA shall convene an IEP meeting to develop appropriate behavioral interventions to address that behavior and shall implement those interventions.

If, subsequently, a child with a disability who has a behavioral intervention plan and who has been removed from the child's current educational placement for more than 10 school days in a school year is subjected to a removal that does not constitute a change of placement for disciplinary removals, the IEP team members shall review the behavioral intervention plan and its implementation to determine if modifications are necessary. If one or more of the team members believe that modifications are needed, the team shall meet to modify the plan and its implementation to the extent the team determines necessary.

For purposes of this section, the following definitions apply:

- Controlled substance means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 USC 812(c)).
- Illegal drug means a controlled substance, but does not include a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.
- Weapon has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code, as well as any weapon defined as a dangerous weapon in the Code of Virginia.
- Serious bodily injury means a bodily injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss of impairment of the function of a bodily member, organ, or mental faculty. (U.S.C. 1365 (g))

Authority of hearing officer.

A hearing officer may order a change in placement of a child with a disability. The hearing officer may:

- return the child to the placement from which the child was removed; or
- order a change in placement of the child to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

The hearing officer must

- consider the appropriateness of the child's current placement;
- consider whether the LEA has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and
- determine that the interim alternative educational setting that is proposed by school personnel who have consulted with the child's special education teacher meets the requirements of the IDEA implementing regulations.

The LEA may ask the hearing officer for an extension of 45 school days for the interim alternative educational setting of a student with a disability when school personnel believe that the student's return to the regular placement would be dangerous to the student or others.

Determination of setting.

The interim alternative educational setting must be determined by the IEP team.

Any interim alternative educational setting in which a child is placed for 45 school days for weapons, drugs, or serious bodily injury by authority of school personnel or by a hearing officer when there is substantial evidence that maintaining the current placement is likely to result in injury to the child or others must:

- be selected so as to enable the child to continue to progress in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and
- include services and modifications to address the behavior and are designed to prevent the behavior from recurring.

Manifestation determination review.

Manifestation determinations are required if the LEA is contemplating a removal that constitutes a change of placement for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the LEA that applies to all children:

- The LEA shall notify the parent or parents of that decision and provide the parent or parents with the procedural safeguards notice not later than the date on which the decision to take the action is made.
- The LEA, the parent, and relevant members of the IEP team shall convene immediately, if possible, but not later than 10 school days after the date on which the decision to take the action is made. The other qualified personnel may include individuals who are knowledgeable about how a student's disability can impact on behavior or on understanding, who understand the impact and consequences of behavior, or who are knowledgeable about the student and the student's disability.

Conduct of review.

The LEA, the parent, and relevant members of the IEP team (as determined by the parent and the LEA) shall review all relevant information in the student's file, including the child's IEP, and teacher observations, and any relevant information provided by the parents to determine:

- if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- if the conduct in question was the direct result of the LEA's failure to implement the IEP.

If the LEA, the parent, and relevant members of the IEP team determine that either of these elements is applicable to the child, the conduct shall be determined to be a manifestation of the child's disability. The team shall:

- conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the LEA had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement;
- in the situation where a behavioral intervention plan has been developed, review the plan and modify it, as necessary, to address the behavior; and
- return the child to the placement from which the child was removed, unless the parent and the local education agency agree to a change of placement as part of the modification of the behavioral intervention plan. The exception is when school personnel have removed a student to an interim alternative educational setting for not more than 45 school days for cases where the child is involved with a disciplinary action related to a weapon, knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, or has inflicted serious bodily injury, in accordance with the provisions noted above. In these cases, the interim alternative educational setting shall be determined by the IEP team.

Determination that behavior was not manifestation of disability.

If the result of the review is a determination that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except that FAPE continues for children suspended or expelled from school.

If the LEA initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.

Appeals.

The parent of a child with a disability who disagrees with any decision regarding placement relative to disciplinary action, or the manifestation determination, or a LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

- When an appeal has been requested by either the parent or the local education agency, the Virginia Department of Education and the LEA shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.

Child's status during due process proceedings.

- The child shall remain in the disciplinary setting pending the decision of the hearing officer or until the expiration of the removal time, whichever occur first, unless the parent and the Virginia Department of Education or LEA agree otherwise.
- The IEP team determines the extent to which services are necessary to enable the student to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the student's IEP.

Review of decision.

- In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the LEA has demonstrated that the child's behavior was not a manifestation of the child's disability consistent with the requirements.
- In reviewing a decision to place the child in an interim alternative educational setting, the hearing officer shall apply the standards in federal and state implementing regulations.
- A placement ordered by the hearing officer under the procedures for an expedited due process hearing may not be longer than 45 school days. If the LEA believes that it is dangerous for the student to return to the current placement, the LEA may request of the hearing officer to extend the placement for longer than 45 school days.

Protections for children not yet eligible for special education and related services.

A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated any rule or code of conduct of the LEA may assert any of the protections provided for in this part if the LEA had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

Basis of knowledge. The LEA must be deemed to have knowledge that a child is a child with a disability if:

- The parent of the child has expressed concern in writing (or orally if the parent does not know how to write or has a disability that prevents a written statement) to personnel of the appropriate educational agency that the child is in need of special education and related services;
- The parent of the child has requested an evaluation of the child pursuant to the IDEA requirements, or
- The teacher of the child, or other personnel of the LEA, has expressed concern about a pattern of behavior demonstrated by the child, directly to the director of special education of the agency or to other personnel in accordance with the agency's established child find or special education referral system.

Exception.

The LEA would not be deemed to have knowledge:

- If the parent of the child has not allowed an evaluation of the child pursuant to the IDEA requirements, or has refused services under this part, or the child has been evaluated and it was determined that the child was not a child with a disability under IDEA, or
- determined that an evaluation was not necessary; and
- provided notice to the child's parents of its determination.

Conditions that apply if no basis of knowledge.

- If the LEA does not have knowledge that a child is a child with a disability prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities who engaged in comparable behaviors.

Limitations.

- If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures, the evaluation must be conducted in an expedited manner.
- Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services.

- If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the LEA and information provided by the parents, the LEA shall provide special education and related services in accordance with the provisions of this part.

Referral to and action by law enforcement and judicial authorities.

Nothing in IDEA or the Virginia regulations prohibits the LEA from reporting a crime committed by a child with a disability to appropriate authorities or to prevent state law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal and state law to crimes committed by a child with a disability to the extent such action applies to students without a disability.

In reporting the crime, the LEA shall ensure that copies of the special education and disciplinary records of the are transmitted for consideration by the appropriate authorities to whom school personnel report the crime. Transmission of such records shall be in accordance with requirements under the Management of the Student's Scholastic Records in the Public Schools of Virginia.

XI. Children with disabilities enrolled by their parents in private schools when FAPE is at issue

Placement of children by parents if FAPE is at issue.

The IDEA does not require a local school division to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that local school division made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the local school division shall include that child in the population whose needs are addressed consistent with IDEA and implementing regulations.

Disagreements about FAPE.

Disagreements between a parent and a local school division regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures.

Reimbursement for private school placement.

If the parents of a child with a disability, who previously received special education and related services under the authority of a local school division, enroll the child in a private preschool, elementary, or secondary school without the consent of or referral by the local school division, a court or a hearing officer may require the local school division to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the Virginia Department of Education and local school divisions.

Limitation on reimbursement.

The cost of reimbursement described in the previous paragraph may be reduced or denied:

- If, at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the LEA to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or at least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the local school division of the information described immediately above.
- If, prior to the parents' removal of the child from the public school, the LEA informed the parents, through the notice requirements in IDEA and implementing regulations of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or
- Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

Exception.

Notwithstanding the notice requirement regarding limitation on reimbursement, the cost of reimbursement may not be reduced or denied for the parents' failure to provide the notice to the local school division if:

- The parent is illiterate and cannot write in English;
- Compliance with the notice requirement above would likely result in physical or serious emotional harm to the child;
- The school prevented the parent from providing the notice; or
- The parents had not received notice of the requirement that sets forth the limitation on reimbursement.

XII. Confidentiality of information

[Additional guidance is available on this subject in VDOE's "Guidelines for the Management of the Student's Scholastic Record in the Public Schools of Virginia",

<http://www.doe.virginia.gov/VDOE/StudentSrves/MSSRedit.pdf>

As used in this section:

Destruction means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

Education records means the type of records covered under the definition of "education records" in 34 CFR part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974 [FERPA])

Participating agency means any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under IDEA. The Virginia regulations use the term LEA.

Notice to parents.

The Virginia Department of Education shall give notice that is adequate to fully inform parents about the requirements of Confidentiality of personally identifiable information, including:

- A description of the extent that the notice is given in the native languages of the various population groups in the state;
- A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;
- A summary of the policies and procedures that participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and
- A description of all of the rights of parents and children regarding this information, including The rights under the FERPA and implementing regulations in 34 CFR part 99.

Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

Access rights.

Each LEA shall permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The LEA shall comply with a request without unnecessary delay and before any meeting regarding an IEP, or any due process hearing and in no case more than 45 days after the request has been made.

The right to inspect and review education records under this section includes:

- The right to a response from the LEA to reasonable requests for explanations and interpretations of the records;
- The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and
- The right to have a representative of the parent inspect and review the records.

The LEA may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

Record of access.

Each LEA shall keep a record of parties obtaining access to education records collected, maintained, or used under IDEA (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

Records on more than one child.

If any education record includes information on more than one child, the parents of those children have the right to inspect and review only the information relating to their child or to be informed of that specific information.

List of types and locations of information.

Each participating agency shall provide parents, on request, a list of the types and locations of education records collected, maintained, or used by the LEA.

Fees.

Each participating agency may charge a fee for copies of records that are made for parents under IDEA if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

A participating agency may not charge a fee to search for or to retrieve information for these purposes.

Amendment of records at parent's request.

A parent who believes that information in the education records collected, maintained, or used under IDEA is inaccurate or misleading or violates the privacy or other rights of the child may request the LEA that maintains the information to amend the information.

The LEA shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

If the LEA decides to refuse to amend the information in accordance with the request, it shall inform the parent of the refusal and advise the parent of the right to a hearing.

Opportunity for a hearing.

The LEA shall, on request, provide an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

Result of hearing.

If, as a result of the hearing, the LEA decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

If, as a result of the hearing, the LEA decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it shall inform the parent of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

Any explanation placed in the records of the child under this section must

- be maintained by the LEA as part of the records of the child as long as the record or contested portion is maintained by the agency; and
- if the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

Hearing procedures.

A hearing held to challenge information in education records must be conducted according to the procedures under FERPA, 34 CFR 99.22.

Consent.

Except as for referrals to or actions by law enforcement and judicial authorities addressed in IDEA implementing regulations for which parental consent is not required by 34 CFR part 99, parental consent must be obtained before personally identifiable information is:

- disclosed to anyone other than officials of participating agencies collecting or using the information under this part; or
- used for any purpose other than meeting a requirement of this part.

The LEA or institution subject to 34 CFR part 99 may not release information from education records to participating agencies without parental consent unless authorized to do so under 34 CFR part 99.

In the event that a parent refuses to provide consent when requested, the LEA shall use established policies and procedures to document the LEA's efforts to obtain consent, resolve the dispute, and provide the parent with an explanation of the consequences if consent is not given.

Safeguards.

Each LEA shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

One official at each LEA shall assume responsibility for ensuring the confidentiality of any personally identifiable information.

All persons collecting or using personally identifiable information must receive training or instruction on Virginia's policies and procedures for ensuring confidentiality of information.

Each LEA shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

Destruction of information.

The LEA shall inform parents when personally identifiable information collected, maintained, or used is no longer needed to provide educational services to the child.

The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

The LEA shall comply with the Records Retention and Disposition Schedule of the Library of Virginia

Children's rights.

The Virginia Department of Education shall provide policies and procedures regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

Under the regulations for 34 CFR part 99, the rights of parents regarding education records are transferred to the student at age 18.

If the rights accorded to parents under IDEA are transferred to a student who reaches the age of majority, the rights regarding educational records must also be transferred to the student. However, the LEA must provide any notice required under section 1415 of the IDEA to the student and the parents.

Enforcement.

The Virginia Department of Education shall provide the policies and procedures, including sanctions, that the State uses to ensure that its policies and procedures are followed and that the requirements of the IDEA and the regulations in this part are met.

Disciplinary information.

The Virginia Department of Education may require that a LEA include in the records of a child with a disability a statement of any current or previous disciplinary action that has been taken against the child and transmit the statement to the same extent that the disciplinary information is included in, and transmitted with, the student records of children without disabilities.

The statement may include a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child.

When the child transfers from one school to another, the transmission of any of the child's records must include both the child's current IEP and any statement of current or previous disciplinary action that has been taken against the child.

Department use of personally identifiable information.

If the U.S. Department of Education or its authorized representatives collect any personally identifiable information regarding children with disabilities that is not subject to 5 U.S.C. 552a (the Privacy Act of 1974), the U.S. Secretary of Education applies the requirements of 5 U.S.C. 552a (b)(1)- (2), (4)-(11); (c); (d); (e)(1), (2), (3)(A), (B), and (D), (5)-(10); (h); (m); and (n); and the regulations implementing those provisions in 34 CFR part 5b.

XIII. State complaint resolution procedures

The Virginia Department of Education maintains and operates a complaint system that provides for the investigation and issuance of findings regarding violations of the rights of parents or children with disabilities. The Superintendent of Public Instruction or designee is responsible for the operation of the complaint system.

The Virginia Department of Education's complaint procedures shall be widely disseminated to parents and other interested individuals, including parent training and information centers, protection and advocacy agencies, independent living centers, and other appropriate entities.

In resolving a complaint in which a failure to provide appropriate services is found, the Virginia Department of Education must address:

- The remediation of the denial of those services, including, as appropriate, compensatory services, the awarding of monetary reimbursement, or other corrective action appropriate to the needs of the child; and
- Appropriate future provision of services for all children with disabilities.

Minimum State complaint procedures.

A time period of 60 calendar days applies after the written complaint is received to carry out the investigation and to resolve the complaint. An extension of the 60 calendar days time period may occur if exceptional circumstances exist with respect to a particular complaint. Both parties to the complaint will be notified in writing by the Virginia Department of Education of the exceptional circumstances and the extended time limit.

Upon receipt of a complaint, the Virginia Department of Education shall initiate an investigation to determine whether the LEA is in compliance with applicable law and regulations in accordance with the following procedures:

- Within seven business days of the receipt of the complaint, the Virginia Department of Education shall send written notification in writing to each complainant and LEA against which the violation has been alleged, acknowledging receipt of a complaint, and shall send copies to other appropriate Virginia Department of Education personnel.
- If a reply from the LEA is not filed with the Virginia Department of Education within 10 business days of the receipt of the notice, the Virginia Department of Education shall send a second notice to the LEA advising that failure to respond within seven business days of the date of such notice will result in review by the Superintendent of Public Instruction or designee for action regarding appropriate sanctions.

The Virginia Department of Education shall review the complaint and reply filed by the LEA to determine if further investigation or corrective action needs to be taken.

- If no further investigation or action is necessary, the Virginia Department of Education shall notify both parties in writing, stating the grounds for such finding.
- If further investigation is necessary, the Virginia Department of Education shall conduct an investigation of the complaint which shall include a complete review of all relevant documentation and may include an independent on-site investigation, if necessary.
- If the complaint is also the subject of a due process hearing or if it contains multiple issues of which one or more are part of that due process hearing, the Virginia Department of Education shall set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing, and resolve any issue in the complaint that is not a part of the due process hearing involving the same parties.
- If an issue raised in the complaint has previously been decided in a due process hearing involving the same parties, the Virginia Department of Education shall inform the complainant that the due process hearing decision is binding.

During the course of the investigation, the Virginia Department of Education shall:

- Consider all facts and issues presented and the applicable requirements specified in law, regulations, or standards.
- Make a determination of compliance or noncompliance on each issue based upon the facts and applicable law, regulations, or standards and notify the parties in writing of the findings and the basis for such findings.

The Virginia Department of Education shall:

- Ensure that the final decision is effectively implemented, if needed, through technical assistance activities, negotiations, and corrective actions to achieve compliance.
- Report findings of noncompliance and corresponding recommendations to the party designated by the Superintendent of Public Instruction for review, or where appropriate, directly to the Superintendent of Public Instruction for further action.
- Notify the parties in writing of any needed corrective actions and the specific steps that must be taken by the LEA to bring it into compliance. The LEA will be given 15 business days from the date of notice of noncompliance to respond and initiate corrective action.

In resolving a complaint in which a failure to provide appropriate services is found, the Virginia Department of Education must address:

- The remediation of the denial of those services, including, as appropriate, compensatory services, the awarding of monetary reimbursement, or other corrective action appropriate to the needs of the child; and
- Appropriate future provision of services for all children with disabilities.

When the LEA develops a plan of action to correct the violations, such plan shall include timelines to correct violations not to exceed 30 business days unless circumstances warrant otherwise. The plan of action will also include a description of all changes contemplated and shall be subject to approval of the Virginia Department of Education.

Parties to the complaint procedures shall have the right to appeal the final decision to the Virginia Department of Education within 30 calendar days of the issuance of the decision in accordance with procedures established by the Virginia Board of Education.

Filing a complaint.

A complaint may be filed by any individual, organization, or an individual from another state and must:

- Be in writing;
- Be signed by the complainant;
- Contain a statement that the LEA has violated the IDEA and implementing federal and state regulations and include the facts upon which the complaint is based;

- Address an action that occurred not more than one year prior to the date the complaint is received, unless the Virginia Department of Education determines that a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received by the Virginia Department of Education; and
- Contain all relevant documents.

Further explanation of procedural safeguards is available by contacting the LEA director of special education, local school division parent resource center, school principal, or the special education office at the Virginia Department of Education.